UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ASARCO LLC, Plaintiff, v. NL INDUSTRIES, INC., *et al.*, Defendants.	Case No. 4:11-cv-00864-JAR

PLAINTIFF ASARCO LLC'S OPPOSITION TO UNION PACIFIC'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff ASARCO LLC ("Asarco") hereby submits its Opposition to Union Pacific Railroad Company's ("Union Pacific") Motion for Summary Judgment (Doc. No. 220).

I. INTRODUCTION

Union Pacific brings a meritless motion for summary judgment. Essentially, it argues that although it purchased, abandoned and operated its contaminated railroad in Southeast Missouri, which contamination continues to pollute and harm the environment to this day, it owes nothing to Asarco, the party that paid to clean up Union Pacific's abandoned mess. The railroad tries to evade damning facts of its continued releases of pollutants and resulting CERCLA liability by relying on inequitable, confusing and technical arguments, most of which it advanced unsuccessfully in its previously filed motion for summary judgment, and none of which should prevail. The Court should deny the Motion for Summary Judgment on statute of limitations grounds because the amended complaint must be deemed to have been timely filed under the applicable Federal Rules of Civil Procedure. The Court should reject the railroad's effort to collect fees as a brutish effort to intimidate the party that paid to clean up its Southeastern Missouri mess.

II. PROCEDURAL HISTORY

The Bankruptcy

On August 9, 2005, Asarco LLC[1] filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court. (Asarco's Response to Union Pacific's Statement of Undisputed Facts "ASDF" 1.) On February 8, 2008, Asarco signed a Settlement Agreement Regarding the Southeast Missouri ("SEMO") Sites (the "SEMO

[1] In 2005, Asarco LLC, together with a number of its subsidiaries, (collectively, "Debtor") filed for voluntary bankruptcy.

Agreement"). (ASDF 2.) On May 12, 2008, Asarco obtained Bankruptcy Court approval of the SEMO Agreement under which the United States was allowed an approximately $80-million claim against the Debtor's estate in regard to the Debtor's environmental liabilities for remediation at SEMO. (Compl. ¶ 15.) The actual amount payable on account of the allowed claim, if any, was not and could not be determined until the Plan was confirmed by the Texas Court and became effective. That occurred some 19 months after approval of the SEMO Agreement. (*Compare* ASDF 9 *with* Asarco's Additional Facts in Opposition to Union Pacific's Motion "ASUF" 2-3.)

No party, including Asarco, should it be responsible for the reorganized company, could make any payments on account of the claim allowed by the SEMO Agreement until both the Texas Court confirmed the Plan (and rejected other competing plans of reorganization) and the Plan became effective on December 9, 2009. (ASUF 2.) The Plan and Confirmation Order required Asarco to pay, among other claims, the SEMO Claim in full with accrued interest on the effective date of the plan. (ASUF 4.)

When the reorganization was concluded, Asarco paid all claims in full, with interest. (ASUF 5.) The environmental claims advanced against Asarco in the bankruptcy, including the SEMO claim, were advanced and satisfied on a joint and several liability basis. (ASUF 6.) The United States Department of Justice provided statements complimenting Asarco for satisfying these claims in full. (ASUF 7.) As one official noted during EPA's Washington, DC press conference on the Asarco bankruptcy, "This demonstrates that just because a company goes into bankruptcy doesn't mean it will avoid its responsibilities." (*Id.*) Another U.S. official stated, "Taxpayers got more than a dollar for every dollar they asked for." (*Id.*) Union Pacific's attempt to characterize Asarco's reorganization as a process resulting in a discount is

contradicted by officials of the United States of America. Asarco addressed its responsibilities in full and paid the bill for Union Pacific's pollution in the process.

Asarco's CERCLA Contribution Claim Against Union Pacific

As a part of the SEMO bankruptcy settlement, Asarco took deliberate steps to preserve its right to initiate CERCLA contribution claims against non-settling third parties. First, Asarco and the United States included a provision in its SEMO joint and several liability settlement agreement that states that third-party claims would be preserved. (ASUF 8.) Second, Asarco included language in all appropriate reorganization documents and disclosures that it preserved and would pursue responsible third parties that did not contribute to the massive SEMO settlement. (ASUF 9.)

With these rights in place, and following the reorganization, using available production records and all readily available records, Asarco filed its Complaint in this action on May 12, 2011, seeking contribution from Defendants for their respective equitable shares of any overpayment incurred by Asarco in its $80 million payment for NCP compliant response costs. (Doc. No. 1 at ¶¶ 34-36.)

On May 13, 2011, Law 360 published an article, stating "Asarco LLC sued BNSF[2] Railway Co. and four others in Missouri on Thursday, seeking contributions toward an $80 million cleanup at a mining site the company has fully covered as part of its bankruptcy reorganization." (ASUF 10.) The article additionally attached a copy of the complaint. (*Id.*)

During the period between May and September 2011, counsel for Asarco actively sought to determine the nature and extent of Union Pacific's ownership, operations and activities that may have contributed to the heavy metals railroad pollution found within the

[2] Burlington Northern Santa Fe Railway Company ("BNSF").

Southeast Missouri Superfund Site ("SEMO"). (ASUF 12.) A report prepared under the direction of the United States Environmental Protection Agency ("EPA"), titled "Historic Railroads: St. Francois County Mined Areas" (the "NewFields' Report"), identified areas of contamination within SEMO where abandoned railroads are located. (Ex. 11 to Union Pacific's Statement of Uncontroverted Material Facts ("UP's SUMF"); ASUF 13.) These areas of abandoned railroads are contributing to the negative environmental impacts in SEMO. *Id.* Although the NewFields' Report identifies heavy metals contamination emanating from abandoned railroad in at least one county within SEMO – St. Francois – this report is only a draft and does not identify or otherwise state anything regarding the ownership of the offending railroad. (Ex. 11 to UP's SUMF; ASUF 13-14.) The NewFields' report does not identify Union Pacific in any manner whatsoever, nor does it indicate that Union Pacific owned, owns or abandoned the polluted railroads in SEMO. (Ex. 11 to UP's SUMF; ASUF 14.)

In an effort to identify the owner or operator of the abandoned lines, Asarco consulted with and retained both an environmental search firm specializing in the identification of "potentially responsible parties" or "PRPs," and an environmental engineering firm tasked with determining the identity of the railroad that operated and abandoned the railroad lines causing pollution in SEMO. (ASUF 15.)

In addition, Asarco studied all available public reports of railroad right-of-way contamination as it pertains to Union Pacific. (ASUF 16.) During the period between May and September 2011, Asarco also researched why the United States Environmental Protection Agency ("EPA") had not pursued a claim against the railroad at SEMO. (ASUF 16.)

Union Pacific's ownership and abandonment could not be ascertained through diligent

search of public records such as title reports, public data base searches, EPA records, Freedom of Information Act requests, all of which were perused. (ASUF 21.) Despite Asarco's diligent efforts, information concerning Union Pacific's operations and ownership of polluting, abandoned rail lines was not available to Asarco prior to May 2011 because Union Pacific failed to make all necessary filings sufficient to place the government, and the public, on notice of its abandonment of acquired railroad lines in SEMO. (ASUF 17.) It was also very difficult to confirm ownership due to a series of corporate successions and transactions that generated an opaque and convoluted history of ownership. (ASUF 18.)

Asarco finally became aware Union Pacific abandoned railroad lines within SEMO during discussions with a former defendant in this case, The Burlington Northern and Santa Fe Railway Company ("BNSF"), in May 2011. (ASUF 19.) Asarco learned that Union Pacific was likely involved in the ownership and abandonment of contaminated rail lines in SEMO and that Union Pacific's ownership could only be confirmed through unraveling the documents that railroads are required to file with the United States Interstate Commerce Commission ("ICC"), and later the United States Surface Transportation Board ("STB"). (ASUF 19, 23.) Asarco also learned during these discussions that Union Pacific may have concealed its ownership, operations and control of the abandoned railroad in SEMO through various corporate purchases and sales and a variety of company succession tactics. (ASUF 18.)

Immediately upon receiving information implicating Union Pacific's concealment and involvement in rail lines in SEMO, Asarco enlisted the assistance of the former Secretary to the Interstate Commerce Commission, Hon. Sidney L. Strickland, Jr. (ASUF 21.) Secretary Strickland sought to further Asarco's research and to determine whether Union Pacific

actually owned or operated any of the rail lines identified in the NewFields' Report as contributing to SEMO's pollution. (ASUF 21-23.)

In September 2011, after investigation of ICC records and further research by Asarco's lawyers and consultants, sufficient evidence emerged linking Union Pacific to the polluted rail lines in SEMO, rendering it responsible under CERCLA. (ASUF 22.) With this preliminary, yet reliable proof of Union Pacific ownership and abandonment of polluting railroad in SEMO, Asarco promptly filed its First Amended Complaint asserting a CERCLA contribution claim against Union Pacific on September 14, 2011. (Doc. No. 9.) The evidence of ownership has since been expanded and confirmed. (Doc. No. 214)

The Railroad asserts in its Motion for Summary Judgment that it had no notice or indication that Asarco might bring an action against it related to SEMO. (Doc. No. 220 p. 6-7). However, Asarco and Union Pacific were engaged in preliminary settlement discussions related to SEMO prior to the time Asarco added the railroad as a defendant in this case. (ASUF 24.) On July 20, 2011, Asarco's attorneys sent a letter to Union Pacific's counsel identifying all of the sites in which Asarco had potential contribution claims under CERCLA, *including SEMO*. (ASUF 24.) The letter further noted that litigation was already pending at some of these sites against other parties and requested the scheduling of a meditation within the next 90 days in order to avoid adding Union Pacific to existing litigation. (Exhibit 1 to the Declaration of Gregory Evans ("Evans Decl."); ASUF 24.) Union Pacific countered with threats against Asarco should it commence an action and has repeatedly attempted to intimidate and threaten Asarco and its outside counsel in an effort to avoid abandoned railroad pollution litigation. (ASUF 25.) Asarco continued its investigation culminating in the information that supported its decision to add Union Pacific as a defendant in September of

2011. (ASUF 22, 26.)

Discovery on Affirmative Defenses Was Stayed by the MCMO

The Court adopted a phased discovery and liability process in its March 11, 2013 Memorandum and Order ("Order," Doc. No. 141). The Court entered this order at Union Pacific's specific request (Doc. No. 114) so as "not to obligate any of the Defendants to conduct discovery until such time as Asarco establishes its *prima facie* case." Order at 7.

On April 8, 2013, Defendants submitted their Proposed Scheduling Plan for Discovery for a *Prima Facie* Showing of Liability. (Doc. No. 146.) In its proposal, Union Pacific set forth its position that "[u]ntil the Court makes a determination on Asarco's *Lone Pine* response, discovery is limited to topics related to Asarco's *prima facie* case with full discovery on liability at a later time if necessary." *Id.* at 2.

Based upon the parties' submissions, the Court issued its MCMO (Doc. No. 147) on June 21, 2013, setting Phase I discovery deadlines while staying discovery on general liability and allocation. *Id.* at 5.

On September 26, 2013, Asarco served its Notice of Deposition of Union Pacific Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, requesting the railroad's person most knowledgeable on a number of Union Pacific's affirmative defenses. (ASUF 33.)

On September 30, 2013, the parties conducted a telephonic meet and confer on the Notices of Deposition that Asarco had sent, wherein the Defendants—including Union Pacific—stated that it was their position that Asarco was not entitled to discovery on affirmative defenses, which was stayed under the MCMO. (ASUF 34.)

On October 4, 2013, Asarco agreed to withdraw its deposition topics relating to Defendants' affirmative defenses based on its understanding of the Court's MCMO, stating that:

> Phase I Liability Discovery solely pertains to Asarco's *prima facie* case of liability and the other issues of liability will be resolved in Phase II Liability. Asarco reserves the right to resume the depositions of Defendants' 30(b)(6) witnesses after the completion of Phase I on such topics as the affirmative defenses and allocation.

(ASUF 35; Exhibit 1 to Brys Decl.)

On July 16, 2014, Union Pacific filed its Motion for Summary Judgment based on its sixth affirmative defense, the statute of limitations (Doc. 220 at 7), alleging that "Asarco's claim against Union Pacific do[es] not relate back to Asarco's original complaint." (Doc. No. 220 at 10.)

Asarco Offer to Withdraw Claims Regarding West Fork, Sweetwater, and Glover Sub-Sites

Union Pacific has unnecessarily and inappropriately filed a motion for summary judgment regarding West Fork, Sweetwater and Glover sub-sites in SEMO. (ASUF 27.) Asarco offered repeatedly to dismiss all claims against Union Pacific other than those claims related to St. Francois and Madison counties within SEMO. (ASUF 27.) On June 18, 2014, Asarco's attorneys offered to withdraw its claims for West Fork, Sweetwater and Glover sub-sites in SEMO, in order that this case could focus on the counties where Union Pacific's ownership and damaging abandonment activities have been confirmed, Madison and St. Francois counties. (Exhibit 2 to Evans Decl.; ASUF 27) Union Pacific would not agree to a dismissal that would satisfy the requirements of the Federal Rules of Civil Procedure, Rule 15. (Exhibit 3 to Evans Decl.; ASUF 28) The railroad refused to allow for a simple amendment accomplishing by agreement what it now seeks to achieve by an unnecessary motion (as to Sweetwater, Glover and West-Fork).

III. LEGAL STANDARD

The railroad's Motion fails to meet the exacting standards applicable on summary judgment. A defendant raising a statute of limitations defense bears the burden of proof. *United*

States v. Soriano-Hernandez, 310 F.3d 1099, 1103-04 (8th Cir. 2002) (statute of limitations is an affirmative defense); *Cal. Sansome Co. v. United States Gypsum*, 55 F.3d 1402, 1406 (9th Cir. 1995). Summary judgment on an affirmative defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A movant for summary judgment bears the initial responsibility of informing the court of the basis for the motion, and must identify those portions of the record which the movant believes demonstrate the absence of a genuine issue of material fact. If the movant does so, the nonmovant must respond by submitting evidentiary materials that set out specific facts showing that there is a genuine issue for trial." *Gannon Int'l, Ltd. V. Blocker*, 684 F.3d 785, 792 (8th Cir. 2012). If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970). The railroad has failed to establish that there are undisputed facts and that it is entitled to judgment as a matter of law.

Even assuming *arguendo*, the Court were to require further information regarding Union Pacific's knowledge of Asarco's contribution claim prior to rendering its decision on summary judgment, when facts are unavailable to the non-movant, rendering it unable to present facts essential to its Opposition (as was the case here given the railroad's refusal to allow discovery on its affirmative defenses, such as the one at issue in its Motion), the Court may deny the motion. Fed. R. Civ. Proc. 56(d).

Under any legal standard, the Motion must be denied.

IV. ARGUMENT

A. To Show Force, Union Pacific Railroad Attacks a Strawman - Union Pacific Refused Asarco's Offer to Withdraw Its Claims for Clean Up Costs at the West Fork, Sweetwater and Glover Smelter Sub-Sites

Asarco intended to withdraw its claims for the West Fork, Sweetwater and Glover Smelter sub-sites prior to its filing of its *Lone Pine* brief, and thus solely focused on St. Francois and Madison County sub-sites in its brief. (*See generally* Doc. No. 214.) Asarco wrote to the railroad on June 18, 2014, offering to withdraw its claims for those sub-sites by way of Stipulation and a Third Amended Complaint and in order to focus on areas where, in the time available and in the context of a Lone Pine showing, Asarco could confirm ownership and abandonment.[3] After all, Asarco had to hire the former Secretary of the Interstate Commerce Commission and two other consultants to unravel the rat's nest created by Union Pacific to conceal liability. (ASUF 21.)

Union Pacific did not accept Asarco's offer to withdraw the claims regarding West Fork, Sweetwater, and Glover Smelter. On July 16, 2014, Asarco provided a detailed substantive response, setting forth why under the Rules of Civil Procedure it could not dismiss claims, which solely consisted of a few allegations, and the proper course was to file an amended complaint as required by Rule 15 of the Federal Rules of Civil Procedure. (Exhibit 3 to Evans Decl.; ASUF 28.) Specifically, Asarco noted:

> A dismissal is not appropriate where less than an entire action is resolved. Fed. R. Civ. P. 41. As universally recognized in case law, Rule 41 of the Federal Rules of Civil Procedure solely applies to dismissals of an entire action. Notably, Rule 41(a)(1) does not allow for piecemeal dismissals; withdrawals of individual claims against given defendants are governed by Rule 15 (Amended and Supplemental Pleadings). *Wallace v. Mercantile County Bank*, 514 F. Supp. 2d 776 (D.C. Md. 2007); *see also Ethridge v. Harbor House Restaurant*, 861 F.2d

[3] A true and correct copy of Asarco's proposed Third Amended Complaint is attached as Exhibit 2 to the Declaration of Gregory Evans.

> 1389 (9th Cir. 1988) (Plaintiff may not use Rule 41 to unilaterally dismiss single claim from multi-claim complaint; Rule 15 is appropriate mechanism where plaintiff desires to eliminate an issue without dismissing as to any defendants); *Smith, Kline & French Laboratories v. A. H. Robins Co.*, 61 F.R.D. 24 (E.D. Pa. 1973) (Plaintiff properly brought motion to dismiss certain claims against all defendants under Rule 15(a) rather than under Rule 41(a), because latter is not applicable in this situation where plaintiff seeks to drop single claim against several defendants, but does not seek to dismiss all claims as to any defendant).

(*Id.*) Asarco again offered to remove the allegations regarding those sub-sites by way of amendment as required by the Federal Rules, but in lieu of providing any response, Union Pacific proceeded to file its motion for summary judgment as to those claims notwithstanding Asarco's agreement to withdraw those very claims nearly a month before the filing of its motion. This is an abusive litigation tactic which, now revealed, should impress no one.

B. The Effective Date of the Plan of Reorganization Commenced the Running of the CERCLA § 113(g)(3)B) Statute of Limitations

CERCLA § 113(g)(3)(B) provides that the statute of limitations for a contribution claim begins to run upon "the date of . . . entry of a judicially approved settlement with respect to such costs." 42 U.S.C. § 9613(g)(3)(B). The term "judicially approved settlement" is not defined in CERCLA, and the effect of the language must therefore be interpreted consistently with the purposes and limitations of a contribution claim, which is to allow a potentially responsible party ("PRP") that has paid more than its fair share of remediation costs to recover the overpaid funds from other PRPs. *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007); *United States v. Berry*, No. 11-2186, 2013 U.S. App. LEXIS 13075, at *36–37 (10th Cir. June 26, 2013). The Court must, in construing the meaning of the undefined term "judicially approved settlement" consistently with the statute's intent, consider the actual facts and context of the bankruptcy settlement at issue here.

For purposes of the accrual of a Section 113(f) contribution claim, a settlement has not been finally "judicially approved" until it is known the amount that will be paid and by whom.

Allowance of a proof of claim determines the validity and allowed amount of the claim under the Bankruptcy Code. *Ziino v. Baker*, 613 F.3d 1326, 1328 (11th Cir. 2010) (explaining that an allowed claim in a bankruptcy case is functionally different from a traditional damages judgment because "[a]n allowed claim in bankruptcy serves a different objective from that of a money judgment—it permits the claimant to participate in the distribution of the bankruptcy estate."). Thus, the Bankruptcy Court's order approving the SEMO Settlement cannot be the trigger under CERCLA § 113(g)(3)(B) because that order was only the first step in determining how much would be paid and by whom. The final step occurred when the Plan was confirmed by the Texas Court and became effective on December 9, 2009, and this final step constitutes the "judicially approved settlement" within the meaning of CERCLA § 113(g)(3)(B).

From a broader perspective, it is illogical in this case to treat provisional bankruptcy approval as "the entry of a judicially approved settlement with respect to such costs or damages" for purposes of the statute of limitations for three additional reasons. First, doing so would cause the contribution statute of limitations to accrue before the equitable basis for the contribution claim came into existence. *See* 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

Second, textually, the final, non-provisional "entry of a judicially approved settlement for such costs and damages" does not and cannot occur until those costs and damages are specified in a confirmed and consummated plan. In bankruptcy where settlement precedes confirmation, a settlement "for such costs and damages" does not finally occur until confirmation and consummation of a plan of reorganization. And while the Debtor has interim protection from

third party claims post settlement, that protection, as the Bankruptcy Court noted in this case, is tentative and defeasible.

Third, the statute presumes that, in the normal case, the judicial approval contemplated by CERCLA § 113(g)(3)(B) is an action by a federal district court. *See* 42 U.S.C. § 9613(b) ("[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act[.]"). The ordinary presumption that a federal district court is the approving authority should not be automatically supplanted in bankruptcy because it is now known that bankruptcy courts cannot finally determine even some cases heretofore regarded as "core" bankruptcy matters. *See generally Stern v. Marshall*, 131 S. Ct. 2594 (2011) (holding that bankruptcy court lacks constitutional authority to enter final orders on certain core matters notwithstanding statutory authority to do so); *Exec. Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency Inc.*), 702 F.3d 553 (9th Cir. 2012) (same), *cert. granted* 133 S. Ct. 2880 (2013). A uniform administrable rule would require the adoption of Asarco's construction of CERCLA § 113(g)(3)(B)—that the date of "judicial approval" of a settlement occurs when it is finally determined that a sum certain will and must be paid by a particular party.

Rather than substantively addressing Asarco's actual position, Union Pacific devotes the overwhelming majority of its argument on Asarco's direct contribution claims to reciting the holdings from various circuit and district courts. None of these decisions are final (*i.e.*, the Montana and Utah cases remain pending in the district courts following the entry of interlocutory orders on motions to dismiss, and Asarco will seek a writ of *certiorari* as to the New York and Colorado cases, which had been appealed to the Second and Tenth Circuits, respectively). They are not binding on this Court and are not persuasive because they depend on the erroneous

supposition that the settlements were unchangeable and static in their application between approval and the Effective Date of the Plan.

Until a plan of reorganization was finally effective, the Debtor's actual liability could have been any amount less than or equal to $1.5 million, including zero, which the Bankruptcy Court expressly recognized could mean that the Debtor's CERCLA liability would never have been "resolved." (ASUF 3.) Under these circumstances, the triggering date is December 9, 2009 (the Effective Date of the Plan). December 9, 2012 fell on a Sunday, and, accordingly, the limitations period was continued to December 10, 2012 pursuant to Fed. R. Civ. P. 6(a)(1)(C). The statute of limitations was not triggered until December 10, 2012, and Asarco's claim filed on September 14, 2011 was timely.

C. Asarco's Claims Relate Back

Asarco filed its original Complaint within the statute of limitations. As noted above, following a deep and confusing investigation, Asarco learned that Union Pacific concealed and misreported to the governing United States agency, the Interstate Commerce Commission, its ownership and abandonment contaminated railroad lines it acquired through complicated transactions. Asarco promptly added Union Pacific as a defendant, within the time period specified under Federal Rule of Civil Procedure, Rule 15. Because Asarco added Union Pacific to this case through its First Amended Complaint ("FAC"), the railroad argues that the complaint is time barred because the it was not filed within three years of the claim settlement approval, rather than the effective date of the reorganization, December 9, 2009. Leaving the effective date versus claim settlement approval date aside, Asarco's amended complaint is not barred because it relates back to the original complaint filed on May 12, 2011.

The determination of whether an amended pleading should be allowed and whether it relates back to the date of the original pleading are matters within the sound discretion of the trial

court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *see also Marchant v. Little Rock*, 741 F.2d 201, 206 (8th Cir. 1984). The decision that a complaint relates back should not be strict or pedantic. The relation back doctrine is applied liberally and with generous deference to the complaining party. *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1543 (8th Cir. 1996) ("Since the purpose of Rule 15(c) is to permit cases to be decided on their merits, it has been liberally construed.") (italics and citation omitted).

The question of whether an amendment relates back to the time of the filing of the original complaint is governed by Rule 15(c). Rule 15(c)(1), provides in relevant part:

> An amendment to a pleading relates back to the date of the original pleading when…
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for the mistake concerning the proper party's identity.

Here, Union Pacific had notice within 120 days of the filing of the complaint. It suffered no prejudice from the filing of the FAC because none of the Defendants had even answered and discovery had not commenced. The claims arose out of the same conduct as that featured in the original complaint. And—as the successor to the owner and operators of nearly all of the rights-of-way in SEMO—it knew or should have known that, but for a mistake concerning the identity of the property party, the action would have been brought against the party.

1. Asarco's claim in the FAC arose out of the same conduct in the original Complaint

Asarco's claim in the First Amended Complaint against Union Pacific arose out of the same conduct set out in the original claim, specifically:

> 34. Asarco has resolved CERCLA liability for response action with the United States and the State of Missouri through the judicially approved bankruptcy reorganization and may seek contribution pursuant to Section 113(f) of CERCLA, 42[*sic*] U.S.C. § 9613(f).
>
> 35. To date, Asarco has incurred approximately $80,000,000 for response action consistent with the NCP pursuant to 42 U.S.C. § 9607(a)(4)(B) and for natural resource damages. This amount represents more than plaintiff's allocable share of costs related to its releases or disposal of hazardous substances at SEMO.
>
> 36. Because each defendant qualifies as a responsible party under CERCLA § 107(a), each defendant is liable for its equitable share of any overpayment incurred by Asarco.

Doc. No. 9 ¶¶ 34-36. Asarco's contribution claim against Union Pacific arose out of that very conduct featured in the original Complaint, including, but not limited to, Paragraphs 34-36.

2. Union Pacific had notice of Asarco's contribution claim within 120 days of the filing of the original Complaint as required by Rule 4(m)

The 1991 amendment to Rule 15(c) changed when the defendant is required to receive notice of the suit. "[I]nstead of requiring notice within the limitations period, relation back is allowed as long as the added party had notice within 120 days [time for service under Rule 4] following the filing of the complaint, or longer if good cause is shown." *Skoczylas v. Fed. Bureau of Prisons*, 961 F.2d 543, 544 (5th Cir. 1992).

Pursuant to Rule 15(c)(1)(C), in order for the amendment to relate back, the party must be served within the period provided by Rule 4(m) for service of the summons and complaint.

Rule 4(m) sets forth the time limit for service as follows:

> If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m)(emphasis added).

In this action, Union Pacific had notice of Asarco's CERCLA contribution claims at SEMO at least as early as July 20, 2011.[4] Asarco did not include Union Pacific in the original complaint because Union Pacific concealed – through a series of complicated and confusing corporate maneuvers – from the United States and others that it purchased, possessed and abandoned contaminated rail lines in SEMO.[5]

There was no delay or impact on the judicial proceedings since none of the Defendants in the SEMO action had even yet responded to the Complaint. Based upon that rationale, there is no prejudice to the Defendant since it was alerted to the existence of Asarco's CERCLA contribution claims at SEMO before the litigation had truly commenced.

3. As required by Rule 15(c)(2), Union Pacific knew or should have known that it should be named in Asarco's original Complaint but for Asarco's mistake as to the proper defendant

The Supreme Court stated that the relation-back rule for adding new parties "depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." *Krupsky v. Cosa Crociere S.p.A.*, 560 U.S. 538, 541 (2010). Thus, as conceded by Union Pacific in its own motion, "The key issue is whether the newly added defendant "knew or should have known that, absent some mistake, the action would have been brought against him." (Doc. No. 220 at 6, citing *Krupsky*, 560 U.S. at 549). Thus, unlike the analysis under Rule 4(m), the analysis under Rule 15(c) is what the *newly*

[4] Asarco would note that it is likely that Union Pacific had notice of the SEMO action even earlier given the Law 360 Article, naming BNSF—a fellow railroad—as a defendant in a CERCLA contribution action, and that at minimum, it is entitled to discovery on that issue prior to the Court's granting of this Motion under Rule 56(d).

[5] Indeed, the United States EPA was unaware of Union Pacific's abandonment practices until this litigation. In a letter dated September 21, 2012, Asarco notified the EPA of Union Pacific's practices and urged the agency to take action. Evans, Decl., Ex. 4.

added party knew or should have known.[6] As established in the proceeding section, Union Pacific clearly knew that it should be a defendant in Asarco's original Complaint as of July 20, 2011. Union Pacific closely monitored the bankruptcy, attending hearings and, notably, public hearings regarding the SEMO settlement conducted in St. Louis, Missouri. Evans Decl., ¶ 3. Further, as the successor to Missouri Pacific and thus the owner and operator of nearly all of the railroads that operated in St. Francois and Madison Counties, Union Pacific knew or should have known that it should be named in Asarco's original complaint but for Asarco's obvious mistake as to the identity of the successor to the historic owners and operators of the SEMO rail lines.

A "mistake" includes a plaintiff's lack of information. Traditionally, a mistake has been limited to misnomer or misidentification, but the Third Circuit Court of Appeals broadened the definition to also include lack of information in *Arthur v. Maersk, Inc.*, 434 F.3d 196, 208-09 (3d Cir. 2006). In *Arthur*, plaintiff sued his employers after suffering a series of injuries while working as a merchant seaman. *Id.* at 199. Less than a year later, plaintiff realized that the companies were operating as agents of the United States Navy, and sought and was granted leave to file an amended complaint naming the United States as a party, and requested that this claim "relate back" to the original complaint to avoid a statute of limitations bar. *Id.* at 199, 204. The District Court acknowledged that the prerequisites for relation back under Federal Rule of Civil Procedure 15(c) had been satisfied, but nevertheless denied the request on the ground that Arthur had unduly delayed in seeking leave to amend. *Id.* at 199. The Court of Appeals reversed, stating in pertinent part:

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[6] As mentioned in the previous footnote and discussed in Asarco's concurrently filed Motion to Stay Briefing, given Asarco had agreed, at Defendants' request, not to conduct discovery on any affirmative defenses (such as statute of limitations), this Motion is premature, and, at minimum, Asarco is entitled to relief under Rule 56(d) of the Federal Rules of Civil Procedure to conduct discovery on when Union Pacific first knew of Asarco's contribution claims at SEMO.

> It is of no consequence that Arthur's mistake resulted from lack of knowledge, rather than mere misnomer....A "mistake" is no less a "mistake" when it flows from lack of knowledge as opposed to inaccurate description. *See* Webster's Third New International Dictionary 1446 (1981) (defining "mistake" as "a wrong . . . statement proceeding from faulty judgment, inadequate knowledge, or inattention"). Both errors render the plaintiff unable to identify the potentially liable party and unable to name that party in the original complaint. Thus, both errors constitute a "mistake concerning the identity of the proper party" for purposes of Rule 15(c).
>
> ...An amendment naming a new party will relate back to the original complaint if the party had adequate notice of the action and should have known that it would have been named in the complaint but for a mistake -- whether the mistake is based on lack of knowledge or mere misnomer.

434 F.3d at 208-09 (citations omitted). In the present action, Asarco lacked information as to the identity of the proper defendant regarding liability for the use of railroad lines that were constructed, maintained and then abandoned with toxic mining waste over vast areas of the SEMO sites. Despite the railroad's numerous citations to the deposition of J. Christopher Pfahl ("Pfahl"), Asarco's 30(b)(6) representative, it omits any reference to Asarco's knowledge that it was *Union Pacific* who succeeded in liability for the railways' contaminations throughout SEMO.

Although Asarco may have had the NewFields report during the bankruptcy when hundreds of thousands of documents were produced and filed and billions in claims were filed (*See* ASUF 1), the NewFields report alone does not establish Union Pacific's CERCLA liability. While the NewFields report discusses the release of toxic metals into the environment from rail lines, it never discusses *Union Pacific* at the SEMO sites. (ASUF 14.) Its section on Railroad History stops in 1972 without mentioning Union Pacific's acquisition of any of the rail lines it details. (ASUF 14.) In fact, nowhere in the report is Union Pacific even mentioned. (ASUF 14.)

As to the railroad's citations to Pfahl's testimony as conclusive of Asarco's knowledge of Union Pacific's liability in the bankruptcy, Pfahl testified that he only reviewed the NewFields report, sampling data (from 2012 and 2013), and Asarco's expert report in this action (from 2014) as related to Asarco's evaluation and assessment of Union Pacific's liability at the SEMO sites. (ASUF 40.) He is not aware of other data available to Asarco pertaining to Union Pacific's liability at the SEMO site. (ASUF 41. Nor is he aware of any audit materials or reports identifying Union Pacific as being potentially liable, and in fact had stated, "I doubt that such document exists." (ASUF 41). Pfahl further testified that the only information Asarco has regarding historic industrial rail line operations in SEMO is from Newfields and the expert Asarco retained for this litigation, Paul V. Rosasco, P.E. (ASUF 42). While the NewFields report was available in 2007, Pfahl in fact noted that nothing in the NewFields report attributes the railroads to any specific owner. (ASUF 43.)

Pfahl had little to no contact with SEMO, having only actually visited the site once in his tenure at Asarco. (ASUF 39). He provides testimony regarding railroads in general, and attributes his findings and experience at other sites to Union Pacific's railroads at SEMO. (ASUF 39.) However, contrary to Union Pacific's misstatements (or deliberate omissions) of Pfahl's testimony, Pfahl admits that the SEMO sites are different. (ASUF 44).

Notably, Pfahl was even unaware of Union Pacific's railroad ownership at the SEMO sites until Asarco initiated litigation. (ASUF 45.) When asked if Asarco made a determination that Union Pacific had liability at SEMO, Pfahl replied that Asarco indeed made that determination and his knowledge of that was "just based on my observation, we sued you." (ASUF 45). He stated that these decisions are made by Asarco's general counsel and outside counsel. (ASUF 46). Counsel for Asarco in this action has since provided a declaration

filed concurrently with this Opposition that the information as to the identity of the proper defendant regarding rail line contamination was not available until *after* the lawsuit was instituted in May 2011. (ASUF 46.)

In fact, Pfahl testified that as of the SEMO Settlement and presentation of that settlement to the Bankruptcy Court for approval, Asarco did not have information as to which other third-parties were liable at the SEMO site. (ASUF 47.) Asarco was not investigating third-parties at the time and was only dealing with parties who had filed proofs of claim. (ASUF 47.) In fact, in the bankruptcy, Asarco reserved its rights to contribution from third-parties and solely commenced to research the liability of other parties after the bankruptcy was finalized in 2011. (ASUF 9, 48.) There were many rail lines identified at the SEMO site that have been abandoned for many years, and Asarco was not aware of their owners until they hired expert Rosasco to analyze. (ASUF 49).

In Union Pacific's attempt to establish that Asarco had the ability to identify the proper defendant, Union Pacific in fact illustrates the opposite. On page 8 of its Motion, the railroad references Asarco's naming of BNSF to support its position that Asarco should have named Union Pacific in its original Complaint. While, as attested by Asarco's counsel, when Asarco named BNSF in the original Complaint, that was a mistake and due to lack of information as to the identity of the proper defendant regarding liability for the rail lines. (ASUF 15-17) Merely, because Asarco had knowledge that rail lines could release hazardous wastes in May 2011, does not establish that Asarco knew that *Union Pacific* should be the party liable for those releases.

Asarco has established that Union Pacific is not entitled to summary judgment on statute of limitations since Union Pacific had notice within 120 days of Asarco's CERCLA contribution claim at SEMO and but for Asarco's mistake as to the identity of the proper defendant, would

have named the railroad in May 2011. At minimum, there is clearly a genuine issue of material fact that requires denial of this Motion at this Phase I stage of discovery.

D. Asarco Is Entitled to Equitable Tolling of the Statute of Limitations

Asarco was unable to obtain vital information to identify Union Pacific as the proper defendant for the rail lines liability at SEMO until after the statute of limitations had run, and is thus entitled to equitable tolling of the statute of limitations. "The failure to bring a timely claim is reasonable if 'despite all due diligence, [the original plaintiffs were] unable to obtain vital information bearing on the existence of [the] claim.'" *Dring v. McDonnell Douglas Corp.*, 58F.3d 1323, 1328 (8th Cir. 1995)(citations omitted). Here, given Asarco's notification to Union Pacific of its CERCLA contribution claims as soon as it identified its potential liability and its prompt filing of the FAC, it is proper to apply the doctrine of equitable tolling to toll Asarco's statute of limitations and find its claims set forth in the FAC timely.

E. Union Pacific Prevented Essential Discovery on Affirmative Defenses

The railroad filed this motion for summary judgment on its statute of limitations affirmative defense, notwithstanding its refusal to allow discovery on its affirmative defenses. (ASUF _.) To properly oppose Union Pacific's summary judgment motion, Asarco is entitled to conduct discovery on Union Pacific's affirmative defenses. Given the Court's MCMO staying all other discovery on liability—including affirmative defenses—until after an order issues on the *Lone Pine* issues, this motion should be denied.

Rule 56(d) of the Federal Rules of Civil Procedure allows the Court to deny a motion for summary judgment when the facts are unavailable to the non-movant. Specifically, the rule states:

> (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Id. The United States Court of Appeals for the Eighth Circuit reviews the denial of a Fed. R. Civ. P. 56(d) motion for abuse of discretion. *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 894 (8th Cir. May 13, 2014). In *Toben*, the Eighth Circuit affirmed the district court's denial of plaintiffs' Rule 56(d) motion to stay briefing after plaintiffs had conducted extensive discovery on class certification discovery issues, including interrogatories, requests for production and at least one deposition. *Id.* at 891. In affirming the denial, the Eighth Circuit stated:

> "As a general rule, summary judgment is proper 'only after the nonmovant has had adequate time for discovery.'" *Hamilton v. Bangs, McCullen, Butler, Foye & Simmons, L.L.P.*, 687 F.3d 1045, 1049 (8th Cir. 2012), quoting *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999). "Nonmovants may request a continuance under Rule 56([d]) until adequate discovery has been completed if they otherwise cannot present facts sufficient to justify their opposition. This option exists to prevent a party from being unfairly thrown out of court by a premature motion for summary judgment." *Id.* at 1050, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "To obtain a Rule 56([d]) continuance, the party opposing summary judgment must file an affidavit 'affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'" *Ray v. American Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010), quoting *Humphreys v. Roche Biomedical Lab., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993).

Id. at 894.

Union Pacific's request is indisputably a premature motion for summary judgment and is seeking to throw Asarco out of court before it has been able to conduct any discovery on the railroad's affirmative defenses, including the statute of limitations affirmative defense. This action is akin to *Iverson v. Johnson Gas Appliance Co.*, where the Eighth Circuit reversed the

district court's denial of a Rule 56(f)[7] motion that had been based upon plaintiff's counsel's affidavit, requesting Rule 56(f) relief since it had been unable to obtain any discovery given the procedural history of the action, including a motion to stay discovery and the conversion of a motion to dismiss to a summary judgment motion. 172 F.3d 524, 530 (8th Cir. 1999). The Eighth Circuit reversed the district court stating that:

> When relevant information is entirely within one party's control, discovery requests must be enforced to ensure that the other party has access to adequate information to respond to a motion for summary judgment. *See Villante v. Dep't of Corrections*, 786 F.2d 516, 521 (2nd Cir. 1986); *see also Nickens v. White*, 622 F.2d 967, 970 (8th Cir. 1980)....Since the district court did not address whether Iverson had an adequate opportunity to pursue his fraud and contract claims, and because it appears he did not, these claims were not yet ripe for summary judgment. *See Palmer v. Tracor Inc.*, 856 F.2d 1131, 1134 (8th Cir. 1988).

Id. at 531.

Unlike *Toben* where plaintiffs had the opportunity to conduct written discovery and depositions on the summary judgment issues, Asarco, like the plaintiff in *Iverson*, has been unable to serve any written discovery at all, or conduct depositions on the affirmative defense at issue in the summary judgment motion. (ASUF 36.) This is exemplified by Asarco's very letter where it reserved the right to conduct 30(b)(6) depositions on affirmative defenses in Phase II of Liability Discovery. (Exhibit 1 to Brys Decl.; ASUF 37.) Given the prohibition on discovery on affirmative defenses, this motion cannot be ripe for summary judgment.

As discussed at length above, the application of the statute of limitations affirmative defense depends on the newly added defendant's knowledge. In Phase II of Discovery, Asarco intends to propound interrogatories, requests for production and requests for admission and take

[7] Fed. R. Civ. P. 56(d) provides the procedure for a non-movant who is unable to "present facts essential to justify its opposition." This was previously governed under Rule 56(f). *See* Fed. R. Civ. P. 56, 2010 Amendments ("Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).").

further depositions to ascertain when Union Pacific first knew—or should have known—about Asarco's contribution claim. (ASUF 37.) Here, Union Pacific's knowledge as to when it first learned of Asarco's CERCLA contribution claim is solely within the possession of Union Pacific's counsel, officers and employees. As with the plaintiffs in *Iverson*, the information that Asarco seeks regarding Union Pacific's motion for summary judgment is within Union Pacific's control. *See Iverson*, 172 F.3d at 531. Discovery must be allowed to ensure that Asarco has access to adequate information to respond to Union Pacific's Motion. *See id.* Pursuant to Rule 56(d), the Motion should be denied.

V. CONCLUSION

This Motion is only the railroad's most recent attempt to obfuscate the actual issues in this litigation to avoid liability—as it has done in nearly every instance across the country—for its massive contamination of the environment through its construction, maintenance and abandonment of rail lines polluted with mining waste. Asarco requests that the Court deny the Motion as to its statute of limitations grounds, and grant Asarco leave to file its Third Amended Complaint to remove certain claims as Asarco had offered to do before Union Pacific filed the instant motion. The railroad's accountability for its action—and inaction—is long overdue, and Asarco is entitled to proceed to discovery—and trial—on the railroad's liability.

Dated: August 11, 2014

/s/ Gregory Evans

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CERTIFICATE OF SERVICE

I certify that counsel of record who are deemed to have consented to electronic service are being served on August 11, 2014 with a copy of this document via the Court's CM/ECF system.

/s/ Gregory Evans
Gregory Evans